

# KELLER AND HECKMAN LLP

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EX PARTE OR LATE FILED

July 10, 2003

## Via Courier and Electronic Filing

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
c/o Vistronix, Inc.  
236 Massachusetts Avenue, N.E.  
Suite 110  
Washington, DC 20002

RECEIVED

Jack Richards  
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JUL 10 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

## Ex Parte Presentation

Re: *Petition for Administrative Sanctions of the State of Hawaii* (MB Docket No. 03-82, IB Docket No. 98-21).

and

Public Notice, Report No. Sat-00156, *DIRECTV Enterprises, LLC*  
*SAT-MOD-20030613-00120* (released July 8, 2003).

Dear Ms. Dortch:

On behalf of our client, the National Rural Telecommunications Cooperative (NRTC), please be advised that the undersigned met yesterday with the following Commission officials to discuss the above-captioned proceedings:

W. Kenneth Ferree  
Bureau Chief, Media Bureau

William H. Johnson  
Deputy Bureau Chief, Media Bureau

Rosalee Chiara  
Media Bureau

Eloise Gore  
Media Bureau  
Assistant Division Chief, Policy Division

NRTC's purpose during the meeting was to discuss why the Commission should grant Hawaii's pending Petition for Sanctions against DIRECTV (*DIRECTV Sanctions Proceeding*).<sup>1</sup> Using the attached Power Point presentation, we explained that since 1999 DIRECTV has been fully capable of providing core programming to Hawaii via DIRECTV 1R. Yet despite being

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<sup>1</sup> See Public Notice, *Media Bureau Action, Request For Comment On Petitions Regarding DIRECTV's DBS Service To The States Of Alaska And Hawaii*, MB Docket No. 03-82 (released March 25, 2003).

Ms. Marlene H. Dortch  
July 10, 2003  
Page 2

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obligated under the Commission's rules to offer comparable service to Hawaii,<sup>2</sup> for the last three years DIRECTV has instead offered a litany of misleading excuses for why it has been unable to do so.

**DIRECTV's Programming In Hawaii  
Is Not "Reasonably Comparable"  
To Its CONUS Programming.**

We showed that in furtherance of its litigation agenda against NRTC, DIRECTV has refused to make 22 specific programming services ("core programming") available to Hawaii for almost four years. The limited programming that DIRECTV has been providing to Hawaii is not remotely comparable to its CONUS packages.

We distributed and discussed Tables from the FCC's Ninth Cable Competition Report (copies attached), which show that many of the core programming services that DIRECTV denies to Hawaii are included in the Commission's list of Top 20 programming services.

We also referred to DIRECTV's own Comments in the Program Access proceeding, where it described TBS, TNT and USA as "critically important" to DBS and "without close substitutes." All three of these programming services are included in the list of core programming services that DIRECTV denies to Hawaii.

We discussed comments by Dish Hawaii in the *DIRECTV Sanctions Proceeding* (copy attached). In its Opposition, DIRECTV characterized Dish Hawaii as one of two retailers actively selling DIRECTV equipment to Hawaiian consumers.<sup>3</sup> We pointed out, however, that according to Dish Hawaii, "99.9999999%" of callers asking about DIRECTV's programming say "no thanks" when they learn what programming is actually available. Dish Hawaii argued that its inability to market DIRECTV services was due to the fact that DIRECTV does *not* provide comparable programming to Hawaii. Dish Hawaii argued that DIRECTV should be fined "for every day that they have denied Hawaii a sellable service since 1999."

We urged the Commission to obtain from DIRECTV and to compare DIRECTV's penetration percentages for its subscribers in the continental United States (CONUS) and in Hawaii. We indicated our belief that DIRECTV's penetration percentage in Hawaii will be far, far lower than for CONUS subscribers. We believe that this disparity is readily explainable by DIRECTV's deficient programming packages in Hawaii, as Dish Hawaii noted.

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<sup>2</sup> 47 CFR § 25.148(c).

<sup>3</sup> *DIRECTV Opposition to Hawaii Petition for Sanctions*, MB Docket No. 03-82, p. 20 (submitted April 24, 2003).

Ms. Marlene H. Dortch  
July 10, 2003  
Page 3

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We also suggested that the Commission obtain and review the actual number of DIRECTV subscribers in Hawaii and compare it with the number of EchoStar's DISH subscribers in Hawaii. We believe that the number of EchoStar's subscribers in Hawaii will far exceed DIRECTV's, due to DIRECTV's inferior programming packages.

**DIRECTV Has Not Been Candid  
With The Commission.**

We discussed DIRECTV's repeated lack of candor with the Commission regarding its deficient program offerings to Hawaii. We distributed and discussed the attached Chart, entitled *DIRECTV's Initial Representations To the Commission Regarding Service to Hawaii*.

Over the course of more than three years, DIRECTV has pointed to a seemingly endless array of problems that prevented it from providing service to Hawaii, including technical limitations, regulatory requirements, spectrum constraints, MVPD competitive concerns, conflicting public interest requirements, the law of physics and prohibitive costs. None of DIRECTV's statements was candid.

In April of 2003, DIRECTV finally "came clean" and openly admitted the real reason it has chosen not to provide comparable programming to Hawaii: to further its litigation agenda against NRTC. We distributed and discussed excerpts from DIRECTV's Opposition to Hawaii's Petition (Opposition), dated April 24, 2003 (copy attached).

In its Opposition, DIRECTV finally admits that its decision not to use DIRECTV 1R to serve Hawaii with core programming has been based on its private litigation agenda against NRTC. Private litigation positions, of course, are irrelevant to a licensee's obligation to comply with Commission requirements. DIRECTV's longstanding evasiveness with the Commission on this point reflects a serious shortfall in candor that falls far below what the Commission requires of its licensees.

We discussed the fact that DIRECTV's lack of candor with the Commission is continuing to the current date. In its recent request for special temporary authority (STA) to relocate DBS-1 and DIRECTV 6, DIRECTV stated that the "primary purpose" of the STA was to "enhance promptly" DIRECTV's service to Hawaii.

Prompt service to Hawaii, however, has never been DIRECTV's concern: DIRECTV 1R has been fully capable of serving Hawaii with core programming since 1999. In fact, DIRECTV's primary purpose in obtaining the STA was -- yet again -- to further its litigation position against NRTC by relocating DBS-1 back at 101 WL° in time for trial (July 22, 2003).

Ms. Marlene H. Dortch  
July 10, 2003  
Page 4

Indeed, DIRECTV's "prompt" provision of "enhanced" service to Hawaii will not occur until DIRECTV-7S is successfully launched in December 2003, at the earliest.<sup>4</sup>

DIRECTV's long-standing violation of the Commission's Geographic Service requirements and its repeated lack of candor with the Commission warrant appropriate sanctions. During our meeting we urged the Commission to act promptly in enforcing its rules and policies.

Your attention to this matter is appreciated. Should you have any questions or require any additional information, please feel free to contact the undersigned.

Sincerely,



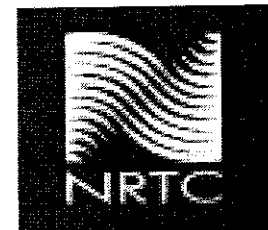
Jack Richards  
Kevin G. Rupy

Attachments:

- NRTC's Power Point Presentation: Why The Commission Should Grant Hawaii's Pending Petition For Sanctions Against DIRECTV.
- Chart: DIRECTV's Initial Representations To the Commission Regarding Service to Hawaii.
- Excerpts from Opposition of DIRECTV to Hawaii Petition for Administrative Sanctions.
- Exhibit: Hawaii Retailer Comments.
- Exhibit: DIRECTV Satellite Fleet.
- Certificate of Service.

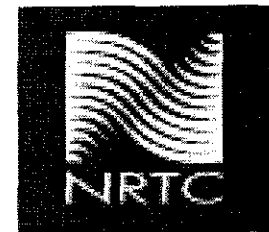
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<sup>4</sup> During the ex parte presentation, NRTC stated that despite grant of the STA on July 2, 2003, DIRECTV had not yet begun to move DBS-1 or DIRECTV-6. NRTC has since learned that DIRECTV-6 apparently began its relocation to the 110° WL orbital location on or about July 7, 2003.



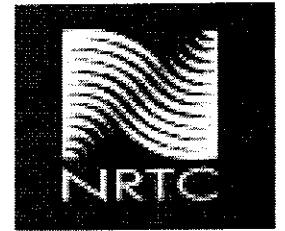
# Why The Commission Should Grant Hawaii's Petition For Sanctions Against DIRECTV

July 9, 2003



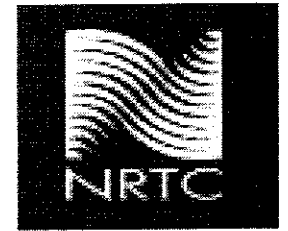
# Why Should The FCC Be Concerned?

- 1. Has DIRECTV complied with the Commission's Geographic Service Rules?**
- 2. If not, is DIRECTV's litigation position against NRTC a justification for not complying?**
- 3. Has DIRECTV been candid with the Commission regarding its provision of service to Hawaii?**



# Background

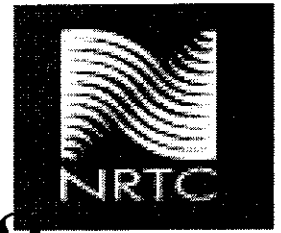
- **NRTC** is a non-profit cooperative comprised of more than 1,000 rural cooperatives and affiliates located in 48 states.
- **April 10, 1992.** NRTC enters into a DBS Distribution Agreement with DIRECTV's predecessor in interest. (1.6 million subs).
- **January 19, 1996.** The FCC's Geographic Service Rules became effective.
- **June 3, 1999.** NRTC files a lawsuit against DIRECTV in the U.S. District Court for the Central District of California.



# How Long Does The NRTC Agreement Last?

- **Fall, 1999.** DIRECTV moves DBS-1 from 101° WL to 110° WL, concurrent with the launch of DIRECTV 1R into 101° WL, and argues in court that DBS-1 is the satellite by which the term of the NRTC Agreement should be measured.
- **DIRECTV believes** that the transmission of “core programming” via DIRECTV 1R will strengthen NRTC’s case that 1R (not DBS-1) is the satellite for purposes of measuring the term of the NRTC contract.

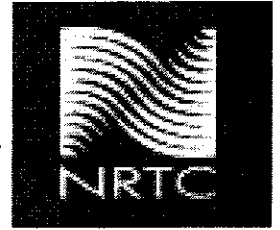




# What Is “Core Programming”?

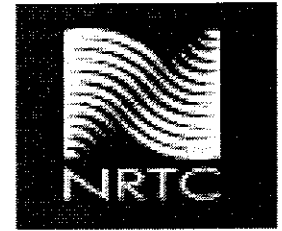
- A&E, Cartoon Network, CNN, Country Music Television, Discovery, Disney, Encore Basic, ESPN, Family Channel, Headline News, The Nashville Network, TNT, Turner Classic Movies, USA, The Weather Channel, WTBS... and others on the list of 22 specific programming services provided to NRTC.

# DIRECTV Provides No Core Programming To Hawaii



- **Since 1999**, DIRECTV has transmitted core programming from DIRECTV 2 (which does not serve Hawaii) rather than DIRECTV 1R (which does).
- DIRECTV's service to Hawaii is **not** **“reasonably comparable”** to the service DIRECTV provides to CONUS subscribers.
- Compare Hawaii vs. CONUS penetration.

# Core Programming Is Key



Federal Communications Commission

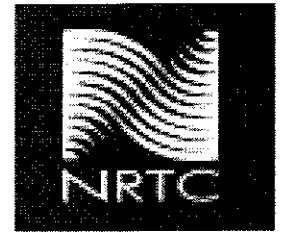
FCC 02-338

- Top 20 Programming Services by Subscribership.
- Core Programming Highlighted.
- Source: 9<sup>th</sup> Competition Report

TABLE C-6  
Top 20 Programming Services by Subscribership

Rank	Programming Network	Number of Subscribers (Millions)	MSO Ownership Interest in Network (%)
1	<b>TBS</b>	87.0	AOL Time Warner (100)
2	<b>Discovery Channel</b>	86.0	Liberty Media (49), Cox (24.6)
3	<b>ESPN</b>	85.9	
4	<b>CNN</b>	85.6	AOL Time Warner (100)
5	<b>USA Network</b>	85.6	Liberty Media (21)
6	<b>INT</b>	85.5	AOL Time Warner (100)
7	Nickelodeon/Nick at Nite	85.3	
8	C-SPAN	85.0	
9	<b>A&amp;E</b>	85.0	
10	<b>TNN</b>	84.9	
11	Lifetime Television	84.6	
12	<b>ABC Family Channel</b>	84.1	
13	<b>The Weather Channel</b>	83.9	
14	MTV	83.4	
15	TLC	83.2	Liberty Media (49), Cox (24.6)
16	AMC	82.6	Cablevision (75)
17	ESPN2	82.6	
18	<b>CNBC</b>	82.3	
19	VH1	81.7	
20	<b>CNN Headline News</b>	81.7	AOL Time Warner (100)

# Core Programming Is Key



Federal Communications Commission

FCC 02-338

- Top 20 Programming Services by Prime Time Rating.
- Core Programming Highlighted.
- Source: 9<sup>th</sup> Competition Report

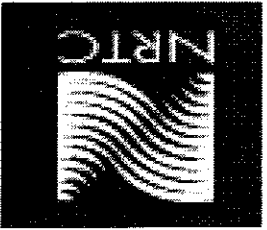
TABLE C-7  
Top 20 Programming Services by Prime Time Rating

Rank	Programming Service	MSO with Ownership Interest (%)
1	Lifetime Television	
2	INI	AOL Time Warner (100)
3	Nick at Nite	
4	TBS	AOL Time Warner (100)
5	Cartoon Network	AOL Time Warner (100)
6	USA Network	Liberty Media (20)
7	Disney Channel	
8	ESPN	
9	A&E	
10	FX	
11	Fox News Channel	
12	Discovery Channel	Liberty Media (50), Cox (24.6)
13	MTV	
14	INN	
15	TLC	Liberty Media (50), Cox (24.6)
16	CNN	AOL Time Warner (100)
17	ABC Family Channel	
18	History Channel	
19	Sci-Fi Channel	Liberty Media (20)
20	Court TV	Liberty Media (50), AOL Time Warner (50)

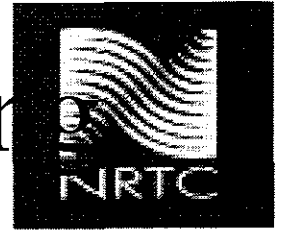
# DIRECTV's Own Views On The Importance Of Core Programming

“...three out of the top five video programming networks ranked by prime-time ratings are vertically integrated with cable firms. These top channels (e.g., TBS, USA, TNT) are critically important to DBS firms in offering a viable alternative to cable providers. The lack of close substitutes for these top channels facilitates the effectiveness of anticompetitive foreclosure.”

Reply Comments of DIRECTV, Inc. CS Docket No. 01-290, pp.7-8 (January 7, 2002).



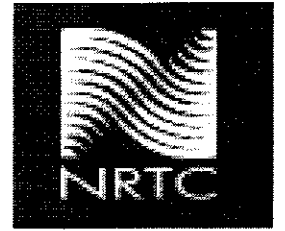
# Why No Core Programming For Hawaii?



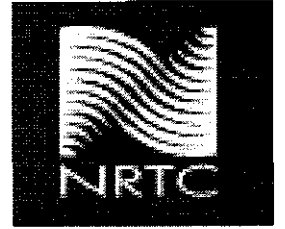
- For 3+ years, DIRECTV told the Commission that core programming was unavailable to Hawaii due to *technical constraints, spectrum limitations, MVPD competitive concerns, conflicts with other public interest requirements or the basic laws of physics.*
- April 24, 2003. DIRECTV finally discloses the real reason ... the NRTC litigation.

[See Attached "Flip Flop Chart"]

# Private Litigation Is Never A Justification For Not Complying With An FCC Requirement



- The Commission does not (and should not) involve itself in private litigation matters.
- Private litigation positions are irrelevant to a licensee's obligation to comply with Commission requirements.

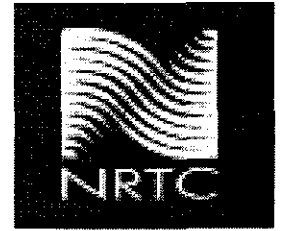


# Candor Regarding The STA

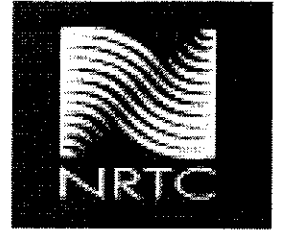
- **May 22, 2003.** The court rejects DIRECTV's Motion for Summary Judgment that DBS-1 at 110 ° WL is the satellite by which the term of the DBS Agreement should be measured.
- **June 11, 2003.** DIRECTV tells the Commission that “the primary purpose” of the STA to move DBS-1 from 110° WL to 101° WL is to “enhance promptly” DIRECTV's service to Hawaii.



# **“Prompt Service” To Hawaii Has Never Been DIRECTV’s Concern**

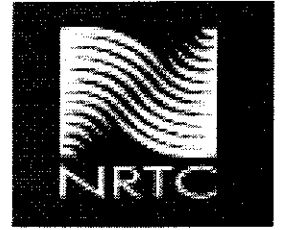


- **DIRECTV 1R has been fully capable of providing core programming to Hawaii since 1999, but DIRECTV has chosen not to use it.**
- **The “primary purpose” of the STA was to further DIRECTV’s litigation position by repositioning DBS-1 back at 101° WL.**
- **Hawaii will still not receive core programming until when/if DIRECTV 7S is successfully launched.**



# Timing

- Using the recent STA, DBS-1 may arrive at 101° WL between July 21-24.
- What coincidence...the DIRECTV/NRTC litigation has been pending for 4 years and ***the trial is scheduled to start on July 22!!!***
- The Commission should rule on the Petition for Sanctions by July 22.



# Sanctions Are Required

- **DIRECTV has engaged in a 3+ year effort to advance its litigation agenda against NRTC by manipulating its satellites and service offerings to Hawaii in violation of the Geographic Service rules.**
- **While DIRECTV was short-changing Hawaii it repeatedly misrepresented its intentions to the FCC.**
- **For DIRECTV's rule violation and lack of candor, sanctions are richly deserved.**

**DIRECTV's Initial Representations  
To the Commission  
Regarding Service to Hawaii**

DIRECTV's provision of service to the State of Hawaii was pushed to the forefront of three separate Commission proceedings: 1) the Geographic Service Proceeding;<sup>1</sup> 2) the DIRECTV-5 Launch Application Proceeding;<sup>2</sup> and 3) the DIRECTV Sanctions Proceeding.<sup>3</sup>

Over the course of more than three years of extensive filings in each of these proceedings DIRECTV pointed to a seemingly endless array of problems that prevented it from providing service to Hawaii, including technical limitations, regulatory requirements, spectrum constraints, MVPD competitive concerns and prohibitive costs. None of these statements was candid.

In April of 2003, DIRECTV finally "came clean" and candidly admitted the real reason it had chosen not to provide comparable programming to Hawaii: to further its litigation agenda against NRTC.

<b>DIRECTV's Statements (Emphasis Added)</b>	<b>Citation</b>
"[W]ithin the constraints mandated by (i) physics, (ii) the need to <b>maximize efficient use of spectrum resources</b> , (iii) the need to keep DIRECTV's core business <b>competitive with services offered by incumbent cable television operators</b> , DIRECTV is committed to offering the best possible service to the citizens of Alaska and Hawaii."	<i>July 17, 2000 DTV-5 Opposition</i> , p. 2.
"... DIRECTV does provide DBS service to Alaska and Hawaii within the <b>technical constraints</b> of its current satellite constellation and its orbital assignments, as required by the rule."	<i>July 17, 2000 DTV-5 Opposition</i> , p. 4.
"DIRECTV recognizes that [the availability of programming to Alaska consumers] is unsatisfying to Hawaii because the programming that DIRECTV has offered to date from 110° and 119° may not be of general interest to most of the Hawaiian population. However, DIRECTV has <b>only three licensed frequencies at the 110° location</b> ."	<i>July 17, 2000 DTV-5 Opposition</i> , p. 4.
"[Hawaii's] interpretation of the Commission's rule would result in a crippling <b>lack of channel capacity</b> for DBS systems, and would result in massive, duplicative waste of spectrum to provide identical programming to Hawaii and CONUS subscribers."	<i>July 17, 2000 DTV-5 Opposition</i> , p. 7.

<sup>1</sup> Notice of Proposed Rulemaking, In the Matter of Policies and Rules for the Direct Broadcast Satellite Service, IB Docket No. 98-21 (released February 26, 1998) (Geographic Service Proceeding). One of DIRECTV's pleadings from this proceeding is referenced herein: Supplemental Reply Comments of DIRECTV, Inc., January 18, 2001 (*January 18, 2001 DIRECTV Reply*).

<sup>2</sup> Public Notice, *DIRECTV Enterprises, Inc., SAT-LOA-20000505-00086*, Report No. SAT-00043 (released May 24, 2000) (DIRECTV-5 Launch Application Proceeding). Two of DIRECTV's pleadings from this proceeding are referenced herein: Opposition and Reply Comments of DIRECTV Enterprises, Inc., July 17, 2000 (*July 17, 2000 DTV-5 Opposition*); and Ex Parte Response of DIRECTV, Inc., August 3, 2000 (*August 3, 2000 DTV-5 Ex Parte*).

<sup>3</sup> Public Notice, *Media Bureau Action, Request For Comment On Petitions Regarding DIRECTV's DBS Service To The States Of Alaska And Hawaii*, MB Docket No. 03-82 (released March 25, 2003) (*DIRECTV Sanctions Proceeding*).

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<b>DIRECTV's Statements (Emphasis Added)</b>	<b>Citation</b>
"[ <b>Local-into-local</b> ] <b>public interest objectives</b> are every bit as important as the goal of providing Hawaiian subscribers with access to attractive programming."	<i>July 17, 2000 DTV-5 Opposition</i> , p. 6.
"Ultimately, such a requirement could lead to the demise of DBS service altogether, as it would necessarily cause DIRECTV to divert capacity that is otherwise absolutely necessary to <b>preserve its competitiveness in the MVPD marketplace.</b> "	<i>July 17, 2000 DTV-5 Opposition</i> , p. 7.
"Hawaii advocates a position that could <b>threaten DBS service</b> viability altogether."	<i>July 17, 2000 DTV-5 Opposition</i> , p. 7.
When only the interests of the State of Hawaii are considered, for example, DIRECTV's first-generation DBS satellites lacked the power to serve both the continental United States <i>and</i> Hawaii with adequate <b>rain fade margin</b> to offer acceptable service, resulting in a delay of the introduction of DIRECTV's DBS service to Hawaii."	<i>August 3, 2000 DTV-5 Ex Parte</i> , p. 1.
"...DIRECTV understands, to a certain extent, Hawaii's historical frustration with the special challenges involved in introducing a <b>viable technical solution</b> that will bring DBS service to Hawaii consumers."	<i>August 3, 2000 DTV-5 Ex Parte</i> , pp. 1-2.
"DIRECTV does not understand . . . [Hawaii's] proffer of a patently absurd reading of Commission rules that would, if adopted, <b>ensure the failure of the DBS service altogether</b> and guarantee that Hawaii citizens never receive such service."	<i>August 3, 2000 DTV-5 Ex Parte</i> , p. 2.
"DIRECTV of course shares Hawaii's goal that all Hawaiian citizens ultimately receive access to a complement of DBS programming comparable to the one to which CONUS subscribers have access. But DIRECTV must also deal with <b>the physics of satellite transmission</b> from different orbital locations . . ."	<i>August 3, 2000 DTV-5 Ex Parte</i> , p. 3.
"But DIRECTV must also deal with the <b>physics of satellite transmission</b> from different orbital locations . . ."	<i>August 3, 2000 DTV-5 Ex Parte</i> , p. 3.
"Hawaii has no answer to DIRECTV's explanation of the <b>prohibitive costs</b> . . . that Hawaii's extreme interpretation of Part 100 would engender."	<i>August 3, 2000 DTV-5 Ex Parte</i> , p. 3.
"DIRECTV of course shares Hawaii's goal that all Hawaiian citizens ultimately receive access to a complement of DBS programming comparable to the one to which CONUS subscribers have access. But DIRECTV must also deal with . . . the expectation of Congress and consumers that DIRECTV will, among other things, <b>offer local broadcast channels</b> via DBS satellites in as many local U.S. markets as possible; continue to dedicate capacity to offer attractive <b>public interest programming</b> ; continue to <b>develop creative and innovative services</b> , such as the DIRECTV PARA TODOS™ Spanish language package, of special interest to underserved constituencies; and continue to exploit its scarce spectrum resources to offer <b>high definition television, broadband</b> capabilities, and other <b>new and upgraded service offerings</b> to keep pace with market dominant cable operators."	<i>August 3, 2000 DTV-5 Ex Parte</i> , p. 3.

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<b>DIRECTV's Statements (Emphasis Added)</b>	<b>Citation</b>
"Hawaii has no answer to DIRECTV's explanation of the <b>prohibitive costs</b> , tremendous <b>capacity waste</b> , and negative <b>competitive effects</b> that Hawaii's extreme interpretation of Part 100 would engender."	<i>August 3, 2000 DTV-5 Ex Parte</i> , p. 3.
"Hawaii suggests that DIRECTV can 'simply shift[] its core programming to [DBS-1R] and DIRECTV-5, which are both reportedly capable of nationwide service.' Hawaii does so, however, without acknowledging that such a change would (i) force <b>massive expense, replacement of hardware, and service disruption</b> to an embedded subscriber base of almost nine million CONUS DBS subscribers, almost all of whom would be forced to purchase new receiving equipment, and (ii) force DIRECTV to continue to rely on the failing [DTV-6] satellite to provide service to consumers, with no replacement capacity available."	<i>August 3, 2000 DTV-5 Ex Parte</i> , p. 4.
"[Hawaii's] proposals . . . are ' <b>economically unreasonable</b> ' to say the least."	<i>August 3, 2000 DTV-5 Ex Parte</i> , p. 5.
"[Hawaii's] proposals <b>threaten the very viability of DBS service</b> . . ."	<i>August 3, 2000 DTV-5 Ex Parte</i> , p. 5.
"In conjunction with [the Commission's Geographic Service Rules], DBS operators are continually seeking to maximize their service offerings through geographic expansion <b>where technically feasible</b> . The Commission should permit DBS operators to retain the discretion and flexibility to respond to <b>market dynamics</b> without artificial constraints."	<i>January 18, 2001 DIRECTV Reply</i> , pp. 2-3.
"As the Commission has observed, <b>market forces along with certain minimum geographic service requirements</b> have ensured steady progress by DBS providers in the difficult task of providing DBS service to the islands." <sup>4</sup>	<i>August 30, 2002 DIRECTV Reply Comments</i> , p. 5.
"[T]he DBS programming packages offered to Hawaiian subscribers are reasonably comparable to the programming packages offered to mainland subscribers, given the significant <b>technical constraints</b> , particularly from the 101° W.L. orbital location, of serving Hawaii."	<i>August 30, 2002 DIRECTV Reply Comments</i> , p. 5.

<sup>4</sup> Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 02-145, FCC 02-178 (released June 14, 2002) (*9<sup>th</sup> Cable Competition Report*). DIRECTV submitted Reply Comments in the *9<sup>th</sup> Cable Competition Report*, dated August 30, 2002 (*August 30, 2002 DIRECTV Reply Comments*).

## **DIRECTV Finally Comes Clean**

“If DIRECTV moves any of [the 22 programming services provided to NRTC] to the newer generation satellite DIRECTV 1R, as suggested in the Hawaii Petition, DIRECTV exposes itself to unwarranted claims that it has changed the satellite that measures the NRTC contract term from an older generation satellite to DIRECTV 1R. Such a claim, if successful, would have a severe economic impact on DIRECTV by extending the NRTC contract term beyond the expected end of fuel life of DIRECTV 1...”

“In light of this litigation, moving any of the twenty-two ‘Programming Services’ onto DIRECTV 1R at this time would create risk for DIRECTV in the current NRTC litigation, which could in turn subject DIRECTV to substantial economic exposure.”

“When there is a final resolution [of the NRTC litigation], DIRECTV will have more flexibility regarding the placement of programming on its various satellites without the constraints (and economic exposure) of litigation . . . DIRECTV will make every effort to prevail in the NRTC litigation . . . ”

*DIRECTV Opposition to Hawaii Petition for Sanctions*, MB Docket No. 03-82, pp. 13-15 (submitted April 24, 2003).

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petitions Regarding DIRECTV's DBS	)	MB Docket No. 03-82
Service to the States of Alaska and Hawaii	)	IB Docket No. 98-21

**OPPOSITION OF DIRECTV, INC.**

Gary M. Epstein  
James H. Barker  
Jeffrey A. Marks  
LATHAM & WATKINS  
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(202) 637-2200

*Counsel for DIRECTV, Inc.*

Dated: April 24, 2003



Hawaii. Hawaii has proffered no evidence to contradict DIRECTV's track record of steadily improving service to the islands, or any basis to doubt that DIRECTV will pursue such proposals. Indeed, the Commission has reiterated recently its desire to "avoid dictating system design or business plans" to DBS providers,<sup>24</sup> and there is absolutely no ground to do so here with respect to Hawaii service.

Nor is it in the public interest to have Hawaii micromanage DBS programming decisions when Hawaii is neither familiar with nor subject to any of the significant technical or economic risks confronted by DIRECTV. For example, the Hawaii Petition states that DIRECTV could "include all of the ten most popular cable programming channels . . . [by moving this programming] from its older satellites at 101° W.L. to its new satellites at the same location."<sup>25</sup> DIRECTV does not dispute that it has the technical capability of moving certain programming channels from DIRECTV 2 to DIRECTV 1R, but, unfortunately, this partial solution to enhancing Hawaii service is not economically feasible at this time. The programming on the DIRECTV 1R satellite is currently the subject of imminent litigation with the National Rural Telecommunications Cooperative ("NRTC"). When the NRTC litigation is resolved, DIRECTV will have the ability to consider this option, and indeed, if the litigation is resolved in DIRECTV's favor, DIRECTV *hereby commits to pursue adjusting its lineup so as to make even more programming available to Hawaiian subscribers.*

Specifically, NRTC distributes certain DIRECTV DBS services through its members and affiliates in designated geographic areas. Under the terms of the NRTC contract, these

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<sup>24</sup> *DBS Rules Order* at ¶ 65.

<sup>25</sup> Hawaii Petition at 12.

distribution rights are tied to the fuel life of the DIRECTV 1 satellite,<sup>26</sup> but DIRECTV 1 suffered a failure of its primary spacecraft control processor on July 4, 1998. DIRECTV has since relocated this satellite to operate at the 110° W.L. orbital location, so that the delivery of a significant portion of programming viewed by the largest number of subscribers would not be on a satellite operating only on its back-up control processor. NRTC apparently viewed the reassignment of DIRECTV 1 as an opportunity to extend the term of its distribution rights. NRTC has since disavowed the contractual link to DIRECTV 1 and instead has offered shifting and inconsistent positions in its litigation with DIRECTV regarding which "satellite" it contends should now measure the term of its contract.

One of the many positions NRTC has taken in the litigation is that whichever satellite transmits twenty-two defined "Programming Services" is the satellite by which the NRTC contract term is measured.<sup>27</sup> Currently, the Programming Services are transmitted on DIRECTV 2, a satellite of the same generation as DIRECTV 1, launched in 1994 with an estimated fuel life that is within approximately two years of the range of the estimated fuel life for DIRECTV 1. If DIRECTV moves any of these twenty-two services to the newer generation satellite DIRECTV 1R, as suggested in the Hawaii Petition, DIRECTV exposes itself to unwarranted claims that it has changed the satellite that measures the NRTC contract term from an older generation satellite to DIRECTV 1R. Such a claim, if successful, would have a severe economic impact on DIRECTV by extending the NRTC contract term beyond the expected end of fuel life of

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<sup>26</sup> DIRECTV 1 is the initial satellite on which DIRECTV's DBS service (and the NRTC contract) commenced.

<sup>27</sup> These services are: A&E, Cartoon Network, CNBC, CNN, Country Music Television, Discovery, Disney, Encore Basic, ESPN, Family Channel, Headline News, The Nashville Network, TNT, Turner Classic Movies, USA, Weather Channel, WTBS, PBS Affiliate, ABC Affiliate, CBS Affiliate, Fox Affiliate and NBC Affiliate.

DIRECTV 1 in approximately 2009 to the end of fuel life of DIRECTV 1R, which may continue through 2024.

In light of this litigation, moving any of the twenty-two “Programming Services” onto DIRECTV 1R at this time would create risk for DIRECTV in the current NRTC litigation, which could in turn subject DIRECTV to substantial economic exposure. Any action DIRECTV takes with respect to the twenty-two Programming Services would necessarily expose DIRECTV to new threats and accusations by NRTC and would alter the facts now subject to dispute in the litigation. Beyond the economic risk associated with moving the Programming Services to DIRECTV 1R prior to resolution of the NRTC litigation, the very act of doing so would likely delay resolution of the dispute, extending the costs and uncertainty associated with prolonged participation in the litigation.

The NRTC litigation is set for trial on June 3, 2003, and its conclusion should result in a declaratory judgment regarding which satellite measures the term of the NRTC contract. When there is a final resolution, DIRECTV will have more flexibility regarding the placement of programming on its various satellites without the constraints (and economic exposure) of litigation.

Therefore, Hawaii is incorrect when it claims that DIRECTV’s claims of formidable technical and economic challenges are “completely unfounded.”<sup>28</sup> These technical and economic challenges exist, but DIRECTV is working diligently to overcome them. Indeed, subject to the outcome of the NRTC litigation, Hawaiian subscribers *could in the near term acquire up to*

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<sup>28</sup> Hawaii Petition at 12.

*twenty-two additional programming services in their service packages*<sup>29</sup> – and DIRECTV will make every effort to prevail in the NRTC litigation and to provide for this result. In the longer term, there is no question that service to Hawaiian subscribers will improve as DIRECTV replaces its CONUS satellites, and/or acquires additional capacity that can be used for Hawaii service. Hawaii thus should be applauding – rather than disparaging – DIRECTV’s efforts on this score.

**IV. LONG-STANDING COMMISSION PRECEDENT DEMONSTRATES THAT DIRECTV IS IN COMPLIANCE WITH THE COMMISSION’S GEOGRAPHIC SERVICE RULES**

**A. The Commission Has Consistently Found Nearly Identical Claims by Hawaii to Be Without Merit**

Despite DIRECTV’s efforts to provide quality DBS service to Hawaii residents, Hawaii has voiced at every opportunity its dissatisfaction that DIRECTV’s service to Hawaii is not *identical* to the service DIRECTV offers to the mainland. Each time Hawaii has brought its allegations to the Commission, however, the Commission has held in DIRECTV’s favor.

The Commission first dealt with Hawaii’s allegations in a November 2000 order granting DIRECTV authority to launch and operate DIRECTV 5.<sup>30</sup> In the *DIRECTV 5 Order*, in response to Hawaii’s allegations, the Commission found that DIRECTV had made great strides in bringing service to Hawaii, stating, “[W]e note that DIRECTV has initiated service to Hawaii. Although Hawaiian subscribers will not be offered the same programming package as CONUS

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<sup>29</sup> DIRECTV notes that these twenty-two additional services include much of the programming that Hawaii complains is currently lacking in DIRECTV’s Hawaii service packages. See Hawaii Petition at 6-7.

<sup>30</sup> *DIRECTV Enterprises, Inc. (For Authority to Launch and Operate a Direct Broadcast Satellite Service Space Station)*, 15 FCC Rcd 23630 (2000) (“*DIRECTV 5 Order*”).

**Hawaii Retailer Comments**

DIRECTV's Opposition cites two retailers who are "actively" selling equipment to Hawaii consumers: Dish Hawaii and Harmer Communications.<sup>1</sup>

Dish Hawaii, however, filed comments in the current proceeding, urging the Commission to sanction DIRECTV.

Relevant excerpts from Dish Hawaii's pleading are contained below.<sup>2</sup>

The question comes down to the following:

Is DirecTV required to serve Hawaii with a comparable package as the Mainland?	Answer: YES
Are the current packages comparable with the packages on the mainland?	Answer: NO
Can DirecTV give the popular basic channels to a transponder that serves Hawaii?	Answer: YES
Are the most popular basic channels available to Hawaii from DirecTV?	Answer NO
Does DirecTV have more capacity at the 101 location than Dish has at the 119 location?	Answer YES
Does Dish Network serve Hawaii with the popular basic channels from less capacity?	Answer: YES
Should DirecTV be penalized for failing to service Hawaii as they are required by the FCC	Answer Yes

If you look at the actual DirecTV verses Dish Network numbers in Hawaii this will prove that DirecTV is not competing here in Hawaii. If they can add the NFL Ticket which only comes on for one day a week they surely can add a basic package that we can sell in Hawaii.

If DirecTV really wanted to serve Hawaii they could do this at any time. I currently receive a couple dozen calls per week about DirecTV service in Hawaii. After telling the callers about the programming packages here, 99.999999 % of them say No Thanks.

Closing:

I feel that DirecTV should be punished and fined for every day they have denied Hawaii a sellable service since 1999. They also should be punished and fined for every person that has called DirecTV and the dealers of Hawaii trying to get service here, only to find out that DirecTV does not have a service here that most people would want to purchase.

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<sup>1</sup> *DIRECTV Opposition to Hawaii Petition for Sanctions*, MB Docket No. 03-82, p. 20 (submitted April 24, 2003).

<sup>2</sup> *Letter from Bill Barker, Dish Hawaii*, MB Docket No. 03-82, p. 2 (submitted April 24, 2003).

## **DIRECTV Satellite Fleet**

Launch Date	Orbital Location		
	<u><b>101° WL</b></u> (32 Freqs.)	<u><b>110° WL</b></u> (3 Freqs.)	<u><b>119° WL</b></u> (11 Freqs.)
December 17, 1993	————→	<b>DTV-1</b> (12/31/99)	
August 8, 1994	<b>DTV-2</b>		
June 1995	<b>DTV-3</b>		
<b>GEOGRAPHIC SERVICE RULES</b> 47 C.F.R. § 25.148(c) (January 19, 1996)			
March 8, 1997			<b>DTV-6</b>
October 10, 1999	<b>DTV-1R</b>		
November 27, 2001	<b>DTV-4S</b>		
May 7, 2002			<b>DTV-5</b>
June 11, 2003 (STA)		←————	<b>DTV-6</b>
June 11, 2003 (STA)	←————	<b>DTV-1</b>	
December 2003(?)			<b>DTV-7S</b>

### Certificate of Service

I HEREBY CERTIFY that on this 10<sup>th</sup> day of July, 2003, a true and correct copy of the foregoing ex parte presentation of the National Rural Telecommunications Cooperative, was submitted via courier and electronic filing to the Federal Communications Commission, and, except where indicated, served via electronic mail upon the following:

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